STATE OF MICHIGAN

COURT OF APPEALS

CYRIL HUDECHEK,

Plaintiff-Appellant,

v

NOVI HOTEL FUND LIMITED PARTNERSHIP, d/b/a DOUBLETREE HOTEL-NOVI,

Defendant-Appellee.

UNPUBLISHED
February 13, 2007

No. 271441
Oakland Circuit Court
LC No. 2005-066321-NO

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant. We affirm.

Plaintiff slipped and fell on a wet sidewalk while leaving defendant's hotel at the conclusion of a professional seminar. The sidewalk had been painted. Plaintiff acknowledged during his deposition that the painted condition of the sidewalk was readily observable. He also acknowledged that as he was exiting the hotel he observed people running from the parking lot to avoid becoming wet from the rain. Plaintiff denied noticing that the sidewalk was wet before he fell. Plaintiff sustained head, neck and back injuries as a result of his fall. He brought suit against defendant, to whom the trial court granted summary disposition under MCR 2.116(C)(10), on the basis that any danger posed by the wet painted sidewalk was open and obvious.

We review de novo a trial court's decision on a motion for summary disposition, examining the entire record to determine whether the moving party was entitled to judgment as a matter of law. *Stopczynski v Woodcox*, 258 Mich App 226, 229; 671 NW2d 119 (2003). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and, after considering the evidence in the light most favorable to the nonmoving party, summary disposition is appropriate if the proffered evidence fails to establish a genuine issue regarding any material fact." *Id*.

"To establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages." *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). "A possessor of

land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Id*. An invitor is liable for injuries resulting from unsafe conditions caused by the invitor's active negligence or, if otherwise caused, where the invitor knew of the unsafe condition or the condition is of such a character or has existed a sufficient length of time that the invitor should have had knowledge of it. *Berryman v Kmart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992). "The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it." *Teufel, supra* at 427; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-610; 537 NW2d 185 (1995).

"Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger on casual inspection." *Teufel, supra* at 427; *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). "If special aspects of a condition make an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk." *Teufel, supra* at 428; *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). "But where no such special aspects exist, the 'openness and obviousness should prevail in barring liability.'" *Teufel, supra* at 428, quoting *Lugo, supra* at 517-518. "[I]f the particular . . . condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Bertrand, supra* at 611.

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree. The undisputed evidence shows that both the painted condition of defendant's sidewalk and that it was raining at the time plaintiff exited defendant's hotel were readily observable. That plaintiff did not observe that the sidewalk was wet is irrelevant. *Novotney, supra* at 475. Plaintiff was talking to his daughter as he walked to his vehicle and, as evidenced by his deposition testimony, was not attentive to the conditions or his surroundings. It is reasonable to conclude that plaintiff would not have been injured had he been attentive to the conditions around him, including simply watching where he was walking more closely. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Thus, the trial court did not err in concluding that the condition of sidewalk was open and obvious.[1]

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[1] Plaintiff asserts that the trial court erred in determining that defendant's painting of the sidewalk did not create a hazardous condition. However, although the trial court did note that plaintiff failed to present any evidence that the painted concrete surface was in fact slippery, it did not make a finding as to whether the sidewalk was hazardous. Rather, the trial court simply concluded that any alleged danger arising from the wet painted sidewalk was open and obvious and as such, would have been discovered and avoided by a reasonably prudent person observing where they were walking. We agree.

Plaintiff also notes deposition testimony by defendant's chief engineer that the sidewalk would have been safer had it been resurfaced. However, as this Court explained in *Novotney, supra* at 475-476, "the question is not whether [the sidewalk] could have been made . . . safer . . . , but whether the [painted sidewalk] was noticeable in its existing condition." Nowhere in his

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We also find plaintiff's assertion that the sidewalk presented an unavoidable and unreasonable risk of harm to be without merit. Plaintiff did not establish that there was no means by which to exit the hotel other than by walking on the painted sidewalk. And even had he done so, the painted sidewalk did not present an unreasonable risk of harm. As our Supreme Court explained in *Lugo, supra* at 518, "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." Thus, for example, a "common pothole" does not "involve an especially high likelihood of injury" and poses "little risk of severe harm," because "[u]nlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Id.* at 520. Similarly, a slippery three-step rise, while likely presenting "some potential for severe harm," does not present an unreasonably severe risk of harm so as to remove it from the open and obvious danger doctrine because, "[f]alling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit." *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 7; 649 NW2d 392 (2002).

In the instant case, the sidewalk on which plaintiff fell was elevated only a single step above the parking lot to which it led. Therefore, the risk presented by the sidewalk was one of potentially falling a short distance to the ground and not "falling an extended distance such as into thirty-foot-deep pit." *Corey*, *supra* at 7. Consequently, even if the alleged danger posed by the sidewalk was unavoidable as plaintiff asserts, the sidewalk did not present an unreasonably high risk of severe harm so as to remove it from the open and obvious danger doctrine.[2] Rather,

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testimony does defendant's engineer indicate that the painted sidewalk was not noticeable by the ordinary user. Indeed, plaintiff conceded during his deposition that it was readily observable that the sidewalk had been painted. Therefore, that defendant might have made the walkway safer is of no moment to the instant appeal. *Id.*

[2] We acknowledge that plaintiff suffered significant injuries as a result of his fall. However, as the Supreme Court explained in *Lugo, supra* at 518, n 2,

> In considering whether a condition presents such a uniquely dangerous potential for severe harm as to constitute a "special aspect" and to avoid barring liability in the ordinary manner of an open and obvious danger, it is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori*, that is before the incident involved in a particular case. *It would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm.* This is because a plaintiff may suffer a more or less severe injury because of idiosyncratic reasons, such as having a particular susceptibility to injury or engaging in unforeseeable conduct, that are immaterial to whether an open and obvious danger is nevertheless *unreasonably* dangerous. Thus, . . . *this opinion does not allow the imposition of liability merely because a particular open and obvious condition has some potential for severe harm.* Obviously, the mere ability to imagine that a condition could result in severe harm under highly unlikely circumstances does not mean that such harm is reasonably foreseeable. However, we believe that it would be unreasonable for us to fail to recognize that unusual open and obvious conditions could exist that are unreasonably dangerous

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it is reasonable to conclude that had plaintiff simply watched his step, any risk of harm arising from the wet sidewalk would have been obviated. Therefore, the trial court did not err in granting defendant's motion for summary disposition.

We affirm.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra

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> because they present *an extremely high risk of severe harm* to an invitee who fails to avoid the risk *in circumstances where there is no sensible reason for such an inordinate risk of severe harm to be presented*. [Emphasis added.]

Despite the extent of plaintiff's injuries, the sidewalk upon which he fell does simply does not pose the extremely high risk of severe harm described in *Lugo,* so as to exclude this case from the open and obvious danger doctrine.